Nos. 76-206 and 76-381

In the Supreme Court of the United States

OCTOBER TERM, 1976

LENA ROSA K. CONLEY, PETITIONER

v.

ESSIE B. SAWYER, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE RESPONDENTS

Petitioner, a former federal employee, seeks review of the court of appeals' affirmance of the dismissal of four different actions brought against officials of the Civil Service Commission, the Department of State, and the Navy.

1. In No. 76-206, and as one of her contentions in No. 76-381, petitioner challenges the dismissals of her libel actions against respondents Sawyer (No. 76-206 Pet. 5) and Wilson (No. 76-381 Pet. 3, 7) on the ground of absolute immunity. In Civil Action 75-367-N, petitioner originally filed suit in state court seeking damages for libel, alleging that respondent Sawyer, secretary to the Personnel Officer at the Naval Supply Center, had made false and libelous statements during an administrative review of petitioner's performance evaluation, which

had been placed in petitioner's personnel file. The statements were respondent Sawyer's recollection of what had happened during a December 1971 meeting regarding petitioner (see No. 76-206 Pet. App. A-5).

The case was removed to the United States District Court for the Eastern District of Virginia, and the district court granted respondent's motion for summary judgment. Assuming that the statement was libelous (an assumption the court found "tenuous at best"), the court ruled that the respondent was acting within the scope of her duties in making the statement and held that "statements, made by government employees acting within the scope of their duties, are accorded an absolute privilege from civil defamation suits. *Barr* v. *Matteo*, 360 U.S. 564, 574 (1959)" (*id.* at A-18).

In Civil Action No. 74-575-N (No. 76-381 Pet. App. A-3), petitioner filed a libel action in the same district court against Frances M. Wilson, the Executive Director of the Bureau of Economics and Business Affairs of the Department of State, for an alleged defamatory statement made in an affidavit which concerned petitioner's work history (see *id.* at A-6). The district court granted respondent's motion to dismiss (*id.* at A-7), on the ground that government officials have an absolute immunity for statements made by them within the line of duty.

The cases were consolidated on appeal and the court of appeals affirmed, holding that "the allegedly libelous statements were clearly in the line of the [respondents'] duty, and thus enjoy absolute immunity. *Barr* v. *Matteo*, [*supra*]" (No. 76-206 Pet. App. A-25; No. 76-381 Pet. App. A-19).

2. The decision by the court of appeals is correct. Notwithstanding subsequent decisions of this Court concerning the immunity available to state officials sued under

42 U.S.C. 1983, *e.g.*, *Scheuer* v. *Rhodes*, 416 U.S. 232, and *Wood* v. *Strickland*, 420 U.S. 308, *Barr* v. *Matteo*, *supra*, stands for the general rule that federal government officials charged with damaging reputations during their performance of duties are protected from damage suits by absolute immunity. That principle is fully applicable to the cases here, both of which involve claims for alleged libel by officials who, the court of appeals found, were acting within their line of duty.

However, the government is filing a petition for a writ of certiorari in *Economou* v. *U.S. Dept. of Agriculture*, 535 F. 2d 688 (C.A. 2), that presents related questions concerning the immunity of federal government officials from damage suits based upon acts done as part of their official duties.[1] In *Economou* the Second Circuit held that federal officials sued for damages based upon their performance of official duties in connection with administrative enforcement proceedings have only a qualified, not an absolute, immunity. As we explain in our petition, the court of appeals in *Economou* believed (erroneously, we submit), that cases such as *Scheuer* and *Wood* had overruled or limited *Barr sub silentio*.

Both the factual setting of *Economou* and the specific question presented in our petition in that case are different from the facts and questions presented in the cases here. Nevertheless, the continuing validity of *Barr* has been called into question by the court of appeals in *Economou*. In view of the interrelatedness of the issues in *Economou*

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[1]Petitioner is being furnished with a copy of our petition in *Economou*.

and these cases, the court may deem it appropriate to hold these petitions pending its disposition of *Economou*.

3. There is no reason, however, to review the other contentions petitioner advances in No. 76-381.

a. In Civil Action 74-100-N (No. 76-381 Pet. App. A-1), petitioner alleged that the Civil Service Commission acted in an arbitrary and capricious manner when it refused to hear her administrative challenge to an allegedly improper personnel action on the grounds that it had not been timely filed (*id.* at A-7). Petitioner alleged that she had been coerced into resigning from her civilian position with the Navy on July 13, 1973. Her appeal, however, was not filed until April 20, 1974, nine months late (*id.* at A-5).

The Commission dismissed her appeal on the ground that 5 C.F.R. 752.204(a) required that an appeal following termination be filed "not later than 15 days after the adverse action has been effected" (see No. 76-381 Pet. App. A-5 to A-6, A-9 to A-10).[2] While 5 C.F.R. 752.204(b)[3] gave the Commission discretion to waive the fifteen-day rule, the Regional Board and, on appeal, the Board of Appeals held that petitioner had not provided a sufficient reason for doing so (No. 76-381 Pet. App. A-6).

The district court held that, in dismissing petitioner's administrative action, the Commission had acted in accord with the above regulations, and that its action was therefore not arbitrary or capricious (*id.* at A-10). The court also held that due process did not prohibit the setting of such

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[2]5 C.F.R. 752.204(a) is now found at 5 C.F.R. 752.203(a). See 39 Fed. Reg. 32542 (September 9, 1974).

[3]5 C.F.R. 752.204(b) is now found in 5 C.F.R. 752.203(a). See 39 Fed. Reg. 32542 (September 9, 1974).

a time limit, and did not require petitioner to be notified that such a time limit existed (*id.* at A-10 to A-11). The court of appeals affirmed (*id.* at A-17 to A-18).

The decision below is correct and there is no need for further review. The tribunals that have considered petitioner's claim have all agreed that petitioner did not file her administrative claim within fifteen days of the alleged adverse action (*id.* at A-9), and thus, that her appeal was not timely. 5 C.F.R. 752.204(a). Discretion to waive the fifteen-day rule is vested in the Civil Service Commission. 5 C.F.R. 752.204(b). In accordance with this discretion, the Commission fully considered petitioner's reasons for filing a late claim and found those reasons to be without merit (No. 76-381 Pet. App. A-10). Petitioner has not alleged a reason for concluding that the Commission abused its discretion. Cf. *Rogers* v. *Hodges*, 297 F. 2d 435 (C.A. D.C.), certiorari denied, 369 U.S. 850. Furthermore, as the district court below correctly observed, there is no constitutional infirmity in placing time restrictions on the pursuit of administrative claims (see No. 76-381 Pet. App. A-10 to A-11).

b. In Civil Action 74-449-N (No. 76-381 Pet. App. A-12), petitioner sued four federal employees, alleging that they had coerced her into resigning. This was the same personnel action that was the subject of the administrative challenge that was dismissed as untimely (see part 3.a., *supra*). Asserting that jurisdiction for her claim was conferred by 28 U.S.C. 1331 and 1361, petitioner sought reinstatement and back pay of approximately $15,000.00.

The district court, treating petitioner's complaint as if it had been properly pleaded under the Tucker Act, 28 U.S.C. 1346(a)(2), dismissed the action on the ground that petitioner had failed to exhaust her administrative remedies (No. 76-381 Pet. App. A-13). Petitioner had not

exhausted her administrative remedies since, as noted above (pp. 4, 5, *supra*), she failed to initiate her administrative appeal within the required fifteen-day time limit, and could not satisfy the Commission that valid reasons existed for such failure. The court of appeals affirmed the dismissal of petitioner's action (*id.* at A-18).

Petitioner's failure to file a timely appeal with the Civil Service Commission constituted a failure to exhaust her administrative remedies. See *Gernand* v. *United States,* 412 F. 2d 1190 (Ct. Cl.), certiorari denied, 414 U.S. 844. It is well settled, as the district court held (No. 76-381 Pet. App. A-13), that "the failure of an employee of the Federal government to exhaust his administrative remedies prevents him from litigating the issue in the Federal courts." See *Beale* v. *Blount,* 461 F. 2d 1133 (C.A. 5); *Gernand* v. *United States, supra*; cf. *Macauley* v. *Waterman S.S. Corp.*, 327 U.S. 540, 543, citing *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48, 50-51. The district court correctly dismissed her suit.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

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